IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.521 OF 1998.

Nagar Parishad Akkalkot,
through its Chief Officer,
Akkalkot,
District Solapur. .. Appellant

vs.

Nagnath Ganpatrao Agarkhed
res. at Akkalkot,
District Solapur .. Respondent.

A.A.Kumbhakoni, Advocate for the Appellant.

Mrs.A.R.S.Baxi , Advocate for the Respondent.

CORAM ; S.R.SATHE, J.

DATED ; 14TH SEPT., 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Court of 4th Additional District Judge, Solapur in Regular Civil Appeal No. 191 of 1993, whereby, the judgment and order passed by the court of Civil Judge, Junior Division Akkalkot

in Regular Civil Suit No. 220 of 1987 dismissing the plaintiffs suit for permanent injunction was set aside, appeal was allowed and permanent injunction restraining the defendant Municipal Council from demolishing the plaintiff's hotel was issued, the original defendant Municipal Council has filed this appeal. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under :

. The house property bearing Municipal number 856A situated at Akkalkot was initially owned by Her Highness Mrudula Raje Bhosale. In the year 1970 there was no construction on the said land. As plaintiff was not having any source of income, Her Highness Mrudula Raje Bhosale gave the suit property to plaintiff through her Private Secretary Madhavrao Bagul. After taking possession of the said property the defendant carried out construction on the same, after informing the defendant Municipal Council about

the same. He spent in all about Rs.20,000/- for the said construction and started his hotel business in the suit property. In the year 1984, the defendant Municipal Council issued notice to the plaintiff and alleged that plaintiff has carried out construction by making an encroachment on the land of Municipal school and also informed him that he should not carry out any business by the side of the road otherwise his licence for carrying out the hotel business will be cancelled. The plaintiff gave reply to the said notice and refused the allegation made against him. Thereafter on 21.9.1987 the defendant Municipal Council again issued notice to the defendant and alleged that plaintiff has made an encroachment on the Government land and therefore called upon him to remove the construction of the said hotel and further informed that on his failure to do so the defendant would remove or demolish the construction in question. Hence on 3.10.1987 plaintiff filed present suit for permanent injunction restraining defendant from removing the construction of plaintiff’s hotel.

3. The defendant Municipal Council filed its written statement at exhibit 19 and resisted the suit claim. They contended that the property in question was never owned by Her Highness Mrudula Raje Bhosale. On the contrary, the property is owned by the Government and subsequently it has been given to Municipal Council. They further contended that the plaintiff has made the encroachment on the defendants property and has done the construction on the land of Municipal Council and as such the plaintiff is not entitled to get permanent injunction as prayed. The defendant also contended that the notice issued by them is legal and correct. Hence on these grounds the defendant prayed for dismissal of the suit.

4. On these pleadings the learned trial judge framed issues at exhibit 26. After considering the evidence adduced by both the parties the trial judge came to the conclusion that the alleged construction was carried out by the plaintiff without obtaining necessary permission for construction from the Municipal Council. The notice issued by the Municipal Council is legal

and correct. The plaintiff has made encroachment on defendants property and as such plaintiff is not entitled for permanent injunction as prayed. Naturally, he dismissed the plaintiffs suit.

5. The plaintiff challenged the above mentioned order of the trial court by filing Regular Civil Appeal No.181 of 1993. After hearing arguments of both the learned Advocates, the First Appellate Court came to the conclusion that the notice issued by the Defendant Municipal Council was not legal and correct. The construction of the hotel was not carried out on the property owned by the Defendant Municipal Council and there is no encroachment as alleged by the plaintiff. He therefore observed that the finding recorded by the trial court was erroneous. As a result of the same, he allowed the appeal and decreed the suit in plaintiffs favour.

6. The Defendant Municipal Council has challenged the above mentioned order passed by the first appellate court in this second appeal. At the time of admission, this court observed "

grounds 1, 2, 3, 5 and 6 raised in the appeal memo are substantial questions of law". At the time of hearing this appeal, Shri A. Kumbhakoni, learned Advocate for the defendant Municipal Council has urged only two points. Firstly, he submitted that the appellate court has erred in holding that there was no encroachment on the defendants land. Secondly, he canvassed before me that the first appellate court has wrongly held that the notice issued by the Defendant Municipal Council was not legal and correct and the defendant was trying to demolish the construction in question without following due process of law. He, therefore, submitted that the present appeal be allowed and the order passed by the Additional District Judge be set aside and plaintiff's suit be dismissed. As against this Smt. Baxi, learned Advocate for the plaintiff supported the judgment and order passed by the first appellate court.

7. It is not in dispute that atleast since the year 1980 the plaintiff is having his hotel in the suit property i.e. in Municipal house no.856A. It is also an admitted fact that

plaintiff is having necessary licence for carrying out hotel business in the said premises. It is the plaintiff's case that the said property was initially owned by Her Highness Smt. Mrudula Raje Bhosale and she gave the said property to him. As against this it is the contention of the Defendant Municipal Council that the land where the hotel in question is situated is owned by the Defendant Municipal Council. However, if we peruse the deposition of such defendants witnesses we find that both of them have clearly admitted that initially the said property was owned by the Government. However, according to them, after the filing of this suit the government has given the said property to defendant and as a result of the order passed by the collector on 24.12.1987 the defendant has become the owner of the said property. It is very clear that the plaintiff has failed to adduce any evidence to show that the property in question was initially owned by Her Highness Mrudula Raje Bhosale. So the first appellate court has rightly held that the plaintiff has failed to prove his case that the said property was owned by Her Highness Mrudula

Raje Bhosale. However, at the same time, it is very clear that admittedly the defendant was not the owner of the land in question on the date of the suit and so the alleged encroachment was also not on the property owned by the Defendant. Naturally, the defendant was not entitled to issue any notice in that behalf. Though it is tried to be suggested that the Defendant Municipal Council is also entitled to take action in respect of encroachment made on the government land no specific provision in that behalf has been pointed out by the learned Advocate for the appellant.

8. From the perusal of the notice issued by the Defendant Municipal Council to plaintiff on 25.7.1984 we find that therein the Defendant Municipal Council had specifically alleged that the plaintiff has made an encroachment on the water tank as well as on the wall of school building and they had therefore asked to construct the wall leaving aside three feet portion from the cover on which there was encroachment. The Municipal Council had further informed the plaintiff that on his failure to remove the said

encroachment within 24 hours, the said encroached portion will be removed by the Municipal Council. It is pertinent to note that inspite of this notice no action has been taken by the defendant Municipal Council regarding removal of the alleged encroachment and three years thereafter i.e. on 21.9.1987 the defendant Municipal Council has issued notice under section 189(8) of the Maharashtra Municipal Act, 1965. If we peruse the said notice exhibit 31 we find that it is addressed to plaintiff and it is a printed notice. The subject is shown as construction without permission and encroachment. On the top of the notice it is also mentioned ‘under section 189(8) of the Maharashtra Municipal Act’. However, if we read the contents of the notice we find that therein the defendant has infact only specifically mentioned that the plaintiff has made an encroachment on the Government land to the extent 40ft x 6 ft and he should remove within 15 days of the receipt of the notice the said unauthorised encroachment failing which the defendant Municipal Council would remove the same. Thus, it appears that the real intention of the Defendant Municipal

Council was not to ask the plaintiff to demolish the construction on the ground that the construction of hotel was carried out without any prior permission of the Municipal Council. The said notice is infact regarding alleged encroachment. However, at the time of trial, an attempt has been made to show that the construction in question has been carried out without prior permission of the Municipal Council and as such Municipal Council is having right to demolish the said construction as per section 189(8) of the Maharashtra Municipal Act. The plaintiff has specifically stated in his deposition that when he received the suit property about 22 years back, he carried out the construction of the hotel after obtaining the necessary permission from the Municipal Council. He has further stated that due to lapse of time now the said permission or the other documents in that behalf are not traceable. It is pertinent to note that even the witness of the defendant Municipal Council has also stated that they are not having any document pertaining to the suit property. He has further stated that it is their

practice to destroy the said papers after five years. So, under such circumstances merely because the plaintiff could not produce the permission we cannot jump to the conclusion that the construction carried out by the plaintiff was without permission of the Municipal Council. While considering this aspect it must be noted that in the earlier two notices issued by the defendant Municipal Council to plaintiff dated 25.7.1984 exhibit 33 and 8.7.1984 exhibit 34 the defendant had nowhere mentioned that the construction of the hotel has been carried out witnout prior permission. If really the plaintiff had not obtained any permission then certainly the defendant Municipal Council would not have failed to mention accordingly in their earlier two notices. We find that the hotel in question is in existence atleast since the year 1980. The defendant Municipal Council has recovered taxes from the plaintiff in respect of the said property. The Municipal Council has also issued necessary licence under the Shops and Establishments Act to the plaintiff for carrying on the hotel business. So, taking into

consideration all these facts and circumstances and considering the preponderance of probabilities it must be held that the plaintiff must have obtained the necessary permission for the construction of the hotel as alleged by him. IN view of the above it appears that there is infact no justifiable ground for the defendant Municipal Council to issue notice dated 21.9.1987 exhibit 31 and they are certainly not entitled to remove the structure on the basis of the said notice.

9. In view of above, it is clear that the defendant Municipal Council has not shown that the plaintiff has made alleged encroachment on the land owned by the defendant. They have also failed to adduce cogent evidence to show that they are having a right to demolish the construction of the plaintiff’s hotel on the ground of section 189(4) of the Maharashtra Municipal Act and on the basis of notice dated 21.9.1987.

. In this view of the matter, the appeal is dismissed with costs and the defendant Municipal council is permanently restrained from demolishing

the plaintiffs hotel situated at Municipal House No.256A, Akkalkot without following due process of law..

. C.C.expedited.

(S.R.Sathe, J)